88- 68

NO.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

OTIS DELAY, JR.,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Whether evidence should have been excluded from trial because there was no probable cause and "exigent circumstances" present for the police to enter into the petitioner's home to make a warrantless arrest?

2. Whether evidence should have been excluded from trial because the warrantless seizure of evidence from the petitioner in his home was not incident to a lawful arrest, and even if the arrest was lawful the police search far exceeded the scope constitutionally permissible of a search incident to a lawful arrest?

3. Whether petitioner's statements should have been excluded from trial because they were elicited by police while

the petitioner was in custody and

without the benefit of Miranda warnings?

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OPINION BELOW

The opinion of the Supreme Court of the State of Georgia affirming the conviction of the trial court is reported at Delay v. The State, 258 Ga. 229, ___ S.E.2d ___ (1988). It is reproduced in the Appendix, beginning at page A-1.

The findings of fact and conclusions of law orally delivered by the trial court whose decision is sought to be reviewed is contained in the Transcript of Record Volume T-II, pages 178-181. It is reproduced in the Appendix, beginning at page A-13.

JURISDICTION OF THIS COURT

The opinion of the Supreme Court of the State of Georgia was decided on May 13, 1988. That court's decision on

several federal constitutional questions conflicts with applicable decisions of the United States Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fourth, Fifth and Sixth Amendments to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution states as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution, in relevant part, states as follows:

"No person shall be . . . compelled in any criminal case to be a witness against himself . . .."

The Sixth Amendment to the United States Constitution, in relevant part, states as follows:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The Petitioner, Otis Delay, Jr., is a 68 year old man. He weighs approximately 135 pounds and is six foot five inches tall. He has emphysema and tuberculosis, and is generally in poor health. On the night in question he was arrested at his Marietta residence of sixteen years, 261 McIntosh Avenue, by the appellee, the State of Georgia.

On June 14, 1986, the police received a call that there was a person shot at a residence on McIntosh Avenue. Officer Freer responded. He observed a large black male laying on the porch face up with a gunshot wound in his chest. A crowd had gathered around the house and was shouting "Willie's been shot, Otis Delay's in the house".

Officer Freer approached the front door and while standing there he observed somebody coming toward the door. He had his gun drawn and as the person inside was starting to open the door Officer Freer grabbed the door knob and shoved open the door himself. Pointing his revolver close to the appellant's head Officer Freer told the petitioner he was under arrest and to get face down on the floor. Officer Freer did not read petitioner his Miranda Rights at this time.

After Officer Freer announced on the radio that the suspect was in custody. Officer Knox came into the house and searched for possibly another perpetrator but found none.

About two to three minutes later, other officers and detectives arrived on the scene, none of whom read the petitioner his Miranda Rights. A Detective Graham approached and asked, "Where is the weapon?" With Detective Graham, Officer Freer, and Assistant Chief Whitmire standing over him, the petitioner responded, "I will show you where it is." Officer Freer picked the petitioner up off the floor and the petitioner led the three police officers down the hallway, to the left and into a back bedroom. There was a gun laying on the bed in the bedroom. As Lieutenant Graham started to reach for the gun the petitioner cautioned that the gun was

loaded. Lieutenant Graham then ejected two shells from the gun.

Another police officer, Sergeant Fann, took the petitioner from the house to the patrol vehicle. While in route to the Marietta Police Department, the petitioner asked, "Why am I being arrested?" Sergeant Fann answered that he assumed the petitioner was being charged with murder. The petitioner responded "I don't think what I did was wrong. I told the guy twice to leave." Sergeant Fann never advised the petitioner of his Miranda Rights.

Lieutenant Graham went back to the Marietta Police Department, where he found Lieutenant Guy in the process of an interview with the petitioner. Guy

was about two-thirds of the way through the pre-interview procedure, when he read the petitioner his Miranda Rights.

Lieutenant Graham personally felt that the petitioner did not understand his rights so Graham went back over them with the petitioner. When Graham reached the waiver portion of the rights, the petitioner stated that he would like to contact his attorney, and the interview was concluded at that time.

The trial court heard argument on petitioner's motion to suppress evidence and a motion to suppress the petitioner's statements on January 13, 1987. The court denied petitioner's motion to suppress. The findings of fact and

conclusions of law orally delivered by the trial court whose decision is sought to be reviewed is contained in the Transcript of Record Volume T-II, pages 178-181. It is reproduced in the Appendix, beginning at page A-13.

The trial court found that the police had probable cause to search the house for the petitioner in the fact that someone was shot and that it was a very short period of time after the incident occurred.

The trial court found that once there has been a lawful arrest made the police are allowed to search through the house to find the weapon.

The trial court also found that Officers having probable cause to arrest

and search do not have to give Miranda warnings to the person in custody if that person makes a voluntary statement; and that officers who arrive on the scene are authorized by law to ask where the weapon is when there's been a shooting.

On January 16, 1987, a verdict of guilty was returned and the petitioner was sentenced the same day. His motion for new trial was filed on February 13, 1987, and subsequently denied on July 13, 1987. The notice of appeal was filed August 10, 1987. The petitioner's Enumerations of Error to the Supreme Court of the State of Georgia numbered one through four encompassed the same constitutional questions sought to be

reviewed by this Court. On May 13, 1988 the Supreme Court of the State of Georgia issued its decision affirming the conviction of the trial Court. See Delay v. The State, 258 Ga. 229 (1988). It is reproduced in the Appendix, beginning at page A-1.

Additionally, a fact material to the consideration of the questions presented here is that at the hearing on the motion to suppress and at the trial itself the State never argued the evidenced obtained in this case by the police would have been inevitably discovered. The issue was first raised in the Attorney General's brief on appeal to the Supreme Court of the State of

Georgia and is used as a basis for that courts decision.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH AMENDMENT

Police entry into a private residence to make a warrantless arrest without probable cause and "exigent circumstances" is in violation of the Fourth Amendment right against unreasonable seizures, as made applicable to the states through the Fourteenth Amendment. The Georgia Supreme Court's decision does not articulate even one fact to show the basis of its decision that the arrest of this petitioner was made with probable cause. Additionally, the court cites Mincey v. Arizona, 437 U.S. 385, 392-293, 98 S.Ct. 2408, 57 L.E.2d 290

(1978) as an all encompassing "murder scene" exception for a warrantless search of a private residence. The Georgia Supreme Court decision affirming the trial court's denial of petitioner's motion to suppress the "fruits" obtained from the illegal arrest; and in denying petitioner's motion for new trial was clearly erroneous.

The initial encounter between Officer Freer and the petitioner was the type of police-citizen encounter which would invoke the Fourth and Fifth amendment safeguards. There are three specifically identifiable types of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and

therefore without the compass of the Fourth or Fifth Amendment, (2) brief 'seizures' that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause. The type of encounter presented in this case was a full-scale arrest of the petitioner by the police. "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained." Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970) and Robinson v. State, 166 Ga.App.741, 305 S.E.2d 381 (1983). Clearly, in this case the petitioner was the subject of a full-scale arrest from the moment the officer forced his way into the appellants' home under the force of a drawn

gun, besides which the officer expressly informed the petitioner as such with the ensuing arrest.

A full-scale arrest must be supported by probable cause. In this case the officer did not have probable cause to arrest petitioner until he entered petitioner's home and found the petitioner to be the sole occupant. The arresting officer admits, referring to the time just before entry, that he did not know who petitioner was prior to that afternoon; or whether the petitioner committed the crime. The police cannot properly stake the right to arrest the petitioner on the crowds statements and the body laying outside, but only on the knowledge that the petitioner alone was

in the house, gained only after, and wholly by reason of their entry into his home. It was therefore their observations inside of his home, after they had obtained admission under submission to police authority, on which they made the arrest.

Probable cause, without more, would be insufficient to justify the warrantless entry into petitioner's home. What the state must demonstrate is that the exigencies of the situation prevented the police from securing a search warrant from a magistrate. United States v. Blasco, 702 F.2d 1315 (1983) Because the protections of the fourth amendment are crucial to a free and viable society, the government shoulders a heavy

burden of justifying the failure to obtain a warrant prior to the intrusion. United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951). The state must demonstrate specific and articulable facts to justify the finding of exigent circumstances, and this burden is not satisfied by leading a court to speculate about what may or might have been the circumstances. See Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed.2d 235 (1979). Thus, even where there is probable cause for a search, it is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable", Payton v. New York, 445 U.S. 573, 100 S. Ct.

1371, 63 L.Ed. 2d 639 (1980), unless the police can show that it falls within one of the carefully defined set of exceptions based on the presence of probable cause and 'exigent circumstances'. United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983); Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983). In the case at bar there were no exigent circumstances: no suspect was fleeing or likely to take flight, the search was of permanent premises, not of a movable vehicle, and there was no proof presented that evidence was threatened with removal or destruction. However, the Georgia Supreme Court, citing Mincey v. Arizona, 437 U.S. 385, 392-393, 98 S.Ct. 2408, 57 L.E.2d 290 (1978), takes the view that

any time a murder is committed the police are free to enter the premises nearby and search and seize anything and everyone inside.

This brings us to the second question presented to this Court for consideration, whether evidence should have been excluded from trial because the warrantless seizure of evidence from the petitioner in his home was not incident to a lawful arrest, and even if the arrest was lawful the police search far exceeded the scope constitutionally permissible of a search incident to a lawful arrest?

The warrantless seizure of evidence from an arrestee in his home must be incident to a lawful arrest and the scope

of that search is limited to the area within the suspect's immediate control.

The court erred in holding that the search through the house to find the weapon was a valid search as incident to a lawful arrest since this alleged ground of validity requires a determination that the arrest itself was lawful. An officer gaining access to a private home must have some valid basis in law for the intrusion. Here, again, no exigent circumstances existed for the forced entry into petitioner's private residence which would have prevented the police from securing a search warrant from a magistrate.

Even if there was a valid arrest the Supreme Court in Chimel v.

California, 395 U.S. 752, 89 S. Ct. 2034 (1969) drastically restricted the physical area in which the search could be performed. The court recognized the police officer's right to search "the area within which [the arrestee] might gain possession of a weapon or destructible evidence, but held that the portion of the premises outside of that control could not be warrantlessly searched incident to arrest." Specifically, the police can search that area that the person could get to, which includes: the person himself, the area within that person's arms reach, and the area where the person can lunge to, and not, a full-scale search of the suspects private residence.

In this case there was no justification for the police to go beyond the room where they arrested the petitioner. The search down the hall and into a bedroom after the petitioner was arrested and handcuffed was unnecessarily widespread. A warrantless search must be "strictly circumscribed by the exigencies which justify it's initiation", Terry v. Ohio, 392 U.S. 1, 25, 88 S. Ct. 1868, 1882, 20 L.Ed.2d 889, and it simply can not be contended that this search was justified by any emergency threatening life or limb. All the person's in the petitioner's house had been located before the investigating homicide officers arrived there and began their search and the scene had been

secured. At trial an officer testified that at the time Officer Freer forced entry into the house and radioed that the suspect was in custody he came into the house and searched for another suspect, but found none. A fact which the trial court and Supreme Court of the State of Georgia completely ignore.

A warrantless search must be "strictly circumscribed by the exigencies which justify it's initiation", Terry v. Ohio, 392 U.S. 1, 25, 88 S. Ct. 1868, 1882, 20 L.Ed.2d 889 Once a protective sweep of the premises is made by the police to search for other possible suspects a second search of the premises must be supported by new facts of probable cause that there is danger to law

officers; or that there is risk of loss or destruction of evidence. Once the first security check was done by the officer it was unreasonable for a second search by the police. There was even less reason for the officers to be concerned about their safety after the petitioner was in custody. As to the State's feigned concern about the aroused crowd outside the house, one of the officers testified at trial that the house was surrounded by police and had been secured as soon as the petitioner had been taken into custody.

II. THE FIFTH AND SIXTH AMENDMENT.

Statements elicited by police from an arrestee while in custody without the

benefit of Miranda warnings are in violation of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to Assistance of Counsel, as made applicable to the states through the Fourteenth Amendment. The Georgia Supreme Court relies on Nix v. Williams, 467 U.S. 431, 448, 104 S.Ct. 2501, 81 L.E.2d 377 (1984) to justify the admissibility of the evidence introduced at trial. However, that case and the doctrine it introduces, requires that the prosecution must prove by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. Indeed, in the case at bar the state fails to meet this burden since it

never raises this issue. The issue was first raised by the Attorney General Office in its brief on appeal to the Georgia Supreme Court.

The Georgia Supreme Court also held that "[it] need not determine whether there was a Miranda defect, as the statement admitted was not inculpatory. Indeed, all it could stand for is that Delay knew the location of the rifle, which was not inconsistent with his defense. Any error in admitting his statement was harmless." As to the Georgia Supreme Court's statement that Miranda protects the defendant from testifing against himself only where the statements are exclupatory, no authority was cited, and none has been found.

In this case the officers and detectives present in petitioner's home and in the police patrol car failed to use the proper procedural safeguards mandated by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694. Miranda warnings are necessary whenever an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, because the privilege against self-incrimination is jeopardized. The essence of the Miranda holding is that custodial interrogation is inherently coercive and that because of such inherent coercion, no statement obtained from a defendant in custody can truly be the product of his free choice.

The rights of a suspect can be waived only under very limited circumstances. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 and Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981). As discussed previously, the petitioner was under arrest and in police custody. The court argues that petitioner was not coerced in anyway to speak and therefore his statements were obtained through his consent. Miranda, however, represents a complete rejection of the "voluntariness" test for judging confessions. The failure to give required Miranda warnings constitutes an irrebutable presumption that the confession was involuntary; no evidence showing that the

suspect was aware of his rights, or that he truly desired to make his confession, can overcome the failure to give the required warnings. It is a remedy, which does not permit inquiry into coercion. The distinction which the State courts below were not cognizant of was; that, what is mandated is a waiver of rights, and not a voluntary consent. Therefore, petitioner's statements to the officers to search his house and other statements obtained from him should be vitiated, as they were elicited in violation of petitioner's right against self-incrimination.

In a last attempt to justify its' holding, the trial court cites the "public safety" exception set out by the

Supreme Court in New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984). In so far as the "public safety" exception is concerned, however, Quarles does not apply to the case at bar.

In Quarles, at 2627, supra, "the record showed that a woman approached two police officers who were on road patrol, told them that she had just been raped, described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. While one of the officers radioed for assistance, the other [officer] entered the store and spotted respondent, who matched the description given by the woman. Respondent ran toward the rear

of the store, and [the officer] pursued him with a drawn gun but lost sight of him for several seconds. Upon regaining sight of respondent, [the officer] ordered him to stop and put his hands over his head; frisked him and discovered that he was wearing an empty shoulder holster; and, after handcuffing him, asked him where the gun was. Respondent nodded toward some empty cartons and responded that 'the gun is over there'. [The officer] then retrieved the gun from one of the cartons, formally arrested respondent, and read him his rights under Miranda."

The United States Supreme Court held that "although respondent was in police custody when he made his

statements and the facts come within the ambit of Miranda, nevertheless on these facts there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence." The court reasoned that "so long as the gun was concealed somewhere in the supermarket, it posed more than one danger to the public safety: an accomplice might make use of it, or a customer or employee might later come upon it." The court went on to state that "[a]n answer was needed to insure that future danger to the public did not result from the concealment of the gun in a public area."

Under the circumstances of petitioner's case there was no danger to the public or to any individuals. The petitioner was in custody on the floor, handcuffed, a protective sweep was done and several officers were surrounding the house. There was no imminency where the police were in a private residence and the owner of the house was in custody as compared to the situation in Quarles where the court was concerned with a future danger to the public from the concealment of a gun in a public area.

Indeed, the facts of our case are similar to the facts in Quarles, in that, upon the arrest of the suspect, the officer finding no gun on the

handcuffed suspect asked where the gun was. This Court held that when Quarles made his statements in police custody these statements came within the ambit of Miranda and therefore, were inadmissible. The facts of the case at bar are clearly similar enough to show that statements obtained by police in this case came within the ambit of Miranda, and warnings were mandated.

The only issue left for consideration is whether the questioning was initiated by law enforcement officers, when Detective Graham asked where the weapon was and Delay who was laying face down on the floor, handcuffed and surrounded by police responded, "I will show you where it is." The Georgia Supreme Court

concludes that "it was Delay's response to the officer's answer to his own question." However, "Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent, . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Clearly, it can not be contended that the question asked by Detective Graham was not one which would reasonably be likely to elicit an incriminating response from this arrestee.

Since there was no probable cause to arrest the petitioner, and since

there were no exigent circumstances to justify the search, nor were there any Miranda warnings given to obtain a valid waiver, the petitioner's statements and evidence obtained therefrom should have been excluded from the evidence at trial. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).

CONSLUSION AND PRAYER

The Fourth, Fifth and Sixth Amendment rights are fundamental, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed by the trial court. Review should be granted, and upon

review, this case should be remanded for trial in accordance with those issues discussed here.

This the 11th day of July, 1988.

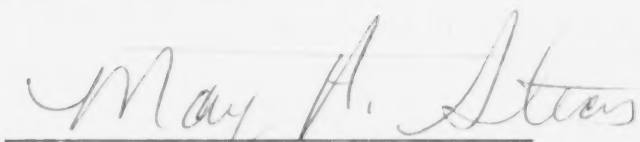
Respectfully submitted,

MELVIN S. NASH

Counsel of Record for

the Petitioner

Bar # 535125



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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.3 of the Rules of this Court three copies of this petition for writ of certiorari were served on counsel for the opposing party, by placing them in the United States mail, first class postage prepaid, addressed as follows:

Thomas J. Charron

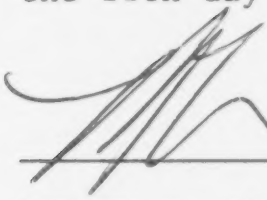
District Attorney

Cobb Judicial Circuit

30 Waddell Street

Marietta, Georgia 30090-9646

This the 11th day of July, 1988.



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Mary A. Stearns

MARY A. STEARNS

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APPENDIX

In the Supreme Court of Georgia

Decided: May 13, 1988

45087. DELAY v. THE STATE.

WELTNER, Justice.

Otis Delay shot and killed Willie C. Gray with a rifle. Delay was found guilty of felony murder by a jury and was sentenced to life in prison.[1] From the evidence the jury could have found that Gray, Delay's neighbor, had been in Delay's house for about fifteen minutes. When Gray left and started walking toward his house, Delay called to him. Gray turned and started back toward

Delay. Delay then shot Gray, who fell to the ground in front of Delay's house. Delay then said to some neighborhood people: "Not none of you all saw me, better not come in my yard." The police arrived shortly thereafter. One of the officers saw Gray lying on the ground, and determined that he was still alive. A large group of neighbors collected, and shouted to the officer that Delay shot the man, and was in his house.

Police officer John Freer went to Delay's front door with his weapon drawn. He heard someone inside the house walk toward the front door and waited until the door was partially opened and then pushed the door inward. He placed his weapon close to Delay's

head, ordered him to the floor, and handcuffed him. The officer then was joined by other police. While Delay was still on the floor a detective arrived. He saw Delay handcuffed and on the floor, but could see no weapon. He asked the group in general: "Where is the weapon?" Delay answered that he would take the officers to it, and led the officers to a bedroom, where the rifle was seen in plain view on a bed.

Delay was not advised of his Miranda rights at the time of his arrest. On the way to the police station he asked the officer transporting him: "Why am I being arrested?" The officer answered that he assumed Delay was being charged with murder. Delay asserted:

"I don't think what I did was wrong. I told the guy twice to leave."

1. From the evidence in this case, a rational trier of fact could have found Delay guilty beyond a reasonable doubt of felony murder. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Delay contends that his arrest was without a warrant and also without probable cause, and that the rifle seized from his home should not have been admitted as evidence.

(a) The arrest was without warrant, but was not without probable cause. "A 'warrantless arrest' is constitutionally valid if, at the moment the arrest is made, the facts and

circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the accused had committed or was committing an offense. [Cit.]" Callaway v. State, 257 Ga. 12, 13-14 (354 SE2d 118) (1987).

(b) Delay contends that the warrantless search that yielded the rifle was constitutionally impermissible, and that the rifle should have been suppressed as illegally seized evidence. In Mincey v. Arizona, 437 U.S. 385, 392-393 (98 SC 2408, 57 LE2d 290) (1978) the court stated: "[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search to

see if there are no other victims or if a killer is still on the premises. [Cit.] 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. [Cit.]' And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. [Cit.]" See also Hatten v. State, 253 Ga. 24, 25 (315 SE2d 893) (1984) and Gilreath v. State, 247 Ga. 814, 821 (279 SE2d 650) (1981). There was no error.

3. Delay asserts that the two statements that he made to the police before he was advised of his Miranda

rights should not have been admitted into evidence.[2]

These contentions must be viewed in the light of the circumstances of this case. Delay shot Gray in the presence of witnesses, who saw him return to his house with a rifle. Delay testified that he shot Gray in defense of self and home.

(a) The rifle was located upon a bed in a room near that in which Delay was held. Obviously, it would have been discovered in the course of even the most cursory search of the house. Nix v. Williams, 467 U.S. 431, 448 (104 SC 2501, 81 LE2d 377) (1984) states: "[W]hen ... the evidence in question

would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." The rifle inevitably would have been discovered independently from Delay's statement. There was no requirement that it be suppressed, even assuming a Miranda defect.

(b) That does not resolve the whole inquiry concerning the first statement, however, as the statement itself was admitted into evidence.

However, in view of the circumstances, we need not determine whether there was a Miranda defect, as the statement admitted was not inculpatory. Indeed, all it could stand for is that

Delay knew the location of the rifle, which was not inconsistent with his defense. Any error in admitting his statement was harmless.

(c) Miranda v. Arizona, 384 U.S. 436, 444-445 (86 SC 1602, 16 LEd2 694) (1966), states: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis supplied.) The second statement, while "custodial," was not initiated by police officers. Rather, it was Delay's response to the officer's answer to his own question. There was no error.

4. Delay claims his defense was unfairly prejudiced by reason of prosecutorial misconduct in the misnaming of a witness for the state. The correct name of the witness was Inman Rucker, but when the district attorney first disclosed the identity of this witness to Delay's attorney the name was given as "Rucker Inman." However, from the testimony in the record it is clear there was no intent on the part of the district attorney to mislead Delay or his attorney or to prevent Delay's attorney from making contact with the witness. Rucker, who at one time rented a room from Delay, simply did not want to talk to Delay's attorney. At any rate, the trial judge provided ample time for

Delay's attorney to interview Rucker before Rucker took the stand.

Judgment affirmed. All the Justices concur.

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[1] The crime took place on June 14, 1986, and Delay was indicted on August 21, 1986. A verdict of guilty was returned on January 16, 1987, and he was sentenced the same day. His motion for new trial was filed on February 13, 1987. The court reporter certified the trial transcript on March 18, 1987, and the motion for new trial was denied on July 13, 1987. The notice of appeal was filed August 10, 1987. The clerk of the trial court certified the record on

August 10, 1987, and it was docketed in this court on October 13, 1987. The appeal was argued on January 11, 1988.

[2] The statements were: "I'll show you where [the rifle] is," and "I don't think what I did was wrong. I told the guy twice to leave."

IN THE SUPERIOR COURT FOR THE COUNTY OF COBB, STATE OF GEORGIA

CRIMINAL ACTION, FILE NO. 86-1365.

The following is findings of fact and conclusions of law orally delivered by the trial court whose decision is sought to be reviewed:

Contained in the Transcript of Record at Volume II, pp. 178-181

THE COURT: All right. At this time the Court is going to deny the motion to suppress the evidence in this case based upon the finding by this Court that there was probable cause for the officers who was -- the first offi-

cer, based on the facts presented at this hearing, the first officer to arrive on the scene, who was told that -- matters not whether he was told he shot Willie, he's inside or Willie's been shot, and Otis Delay shot him, with the information that someone has been shot and in fact the officer has testified the man who had been shot was lying on the steps when he arrived, it was in a very short period of time after the incident occurred, and the officer was authorized to pursue anyone who's inside the house based upon what he was told. Even if it's hearsay, he can act on hearsay in order for there to be probable cause. He can enter the house, which he did upon the evidence. He ar-

rested the man who was inside. Once there's a lawful arrest, police are authorized to search -- these are the first officers on the scene -- for weapons, especially if there's just been a shooting within two to five minutes, whatever the evidence, three to eight minutes. There's just been a shooting, they can look for the weapon even upon their arrival on the scene, and here we have probable cause for them to arrest the defendant, which they did, and for them to search in conjunction with that.

Insofar as the motion to suppress the defendant's statement is concerned, the only evidence presented to this Court is that the conversation between

the officer who was transporting the defendant to the police department, the only conversation that occurred was one that begun by the defendant himself, asking the police officer what he was going to be charged with and the officer told him he thought it was going to be murder and then the defendant making the statement that, "I don't think what I did was wrong, I told the guy twice to leave." It was a voluntary statement under the evidence the Court has heard at this hearing, and the Court will deny the motion to suppress the statement of the defendant.

MR. NASH: As far as the Miranda phase, you are to advise him of his Miranda Rights, you don't think that --

THE COURT: First officers arriving on the scene have a right to, if they have got probable cause, arrest and search; and as far as the statement is concerned, you don't have to give Miranda warnings if somebody is making a voluntary statement.

MR. NASH: How about the statement --

THE COURT: I am not going to argue with you, Mr. Nash.

MR. NASH: The statement that, you know, five minutes later when Graham gets there, where is the gun, and then

he tells him and he goes back in the back, you don't think he's required to give Miranda rights then?

THE COURT: The officers who arrived on the scene are also authorized to ask questions in regard to the weapon when there's just been a shooting, and not only can they ask the question generally but I believe the law authorizes them to ask it specifically, where the weapon is.

MR. NASH: We would respectfully except the Courts ruling.

MR. COLE: Your Honor, may I cite a couple of cases just for the record?

The State would cite Hatten versus the State at 253 Georgia 24, page --

THE COURT: I don't believe you need to cite anything. The Court has already ruled. The Court is familiar with what the law is in the area. All right. Are counsel ready for opening statements in the case.

Contained in the Transcript of Record at Volume IV, pp. 58-59

THE COURT: At this time, the Court is citing, for the record, on that issue of whether or not the officers could ask a question of the defendant concerning the location of the weapon. The 1984

Supreme Court in the United States decision New York versus Ben Quarrels, 104 Supreme Court Reporter at 2626, case holding that the officers could ask that question when they arrived at the scene and although the defendant was surrounded by four officers, they could ask him specifically where the weapon was because there was a weapon missing at the time and there were members of the public around and they've referred to that as the public safety exception to Miranda.

Bring the jury in, please.

Counsel are to use that case as guidance in asking further questions of witnesses in regard to Miranda warnings.

MR. NASH: I don't think that case is applicable to this case, Your Honor.

(Whereupon, the jury entered the courtroom.)

(2)

No. 88-68

In The

Supreme Court of the United States

October Term, 1988

OTIS DELAY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

A.

Whether this Court should grant a writ of certiorari to review the Supreme Court of Georgia's determination that the Petitioner's arrest was based upon probable cause and that evidence seized thereafter was properly obtained by police authorities?

B.

Whether this Court should grant a writ of certiorari to review a determination by the Supreme Court of Georgia that the murder weapon in this case would inevitably have been discovered and that the Petitioner's statements in relation to the murder weapon were not inculpatory so as to create any harm to the Petitioner?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

STATEMENT OF THE CASE

A. Course of the Proceedings.

Petitioner, Otis Delay, Jr., was indicted in the Superior Court of Cobb County, Georgia, during the July Term, 1986, for the felony murder of Willie C. Gray. (R. 3-4).[1] Following a trial by jury, the Petitioner was found guilty as charged and received a sentence of life imprisonment. (R. 153, 174). The Petitioner's motion for new trial was denied on July 15, 1987, and a notice of appeal

[1]References made to the trial court record are designated as "R.". References made to the trial transcript are designated as "Volume —, T."

was filed on August 10. (R. 165-67, 180-1-2). On May 13, 1988, the Supreme Court of Georgia affirmed the Petitioner's conviction and sentence. *Delay v. State,* 258 Ga. 229, — S.E.2d — (1988). The instant petition for writ of certiorari now follows.

B. Statement of Facts.

The Petitioner and Lillie Maye Grogin resided at 261 McIntosh Avenue, Marietta, Georgia in Cobb County. (Volume III, T. 22, 31, 99, 128; Volume IV, T. 103-04). Mr. Willie Gray lived across the street and knew the Petitioner. (Volume IV, T. 104). In fact, witness Inman Rucker testified at trial that he had originally met Mr. Gray at the Petitioner's home. (Volume III, T. 16).

Mr. Inman Rucker also testified at trial as to the events that occurred during the afternoon of June 14, 1986. Mr. Gray and Mr. Rucker were sitting under a tree in Willie Gray's yard. (Volume III, T. 16). When Helen Burton drove up, Mr. Gray walked to the vehicle. (Volume III, T. 17, 19; Volume IV, T. 109). The Petitioner exited his residence and also approached the automobile. (Volume III, T. 19). The Petitioner and Mr. Gray spoke and then went into the Petitioner's residence together. (Volume III, T. 19-20).

Mr. Rucker further testified at trial that Mr. Gray exited the Petitioner's home after approximately 10 to 15 minutes as though to return home. (Volume III, T. 20, 30). According to Mr. Rucker, the Petitioner called to Mr. Gray. (Volume III, T. 21). In response, Willie Gray turned around and had his left hand on the porch rail. (Volume III, T. 21, 26, 30). The Petitioner then shot Mr. Gray

with a rifle. (Volume III, T. 21, 30). The victim fell on his back with his feet on the top steps of the porch and his head on the sidewalk. (Volume III, T. 34). The Petitioner reloaded the rifle saying, "Not none of you all saw me, better not come in my yard." (Volume III, T. 24). The Petitioner went inside his home and the authorities arrived shortly thereafter. (Volume III, T. 24).

Marietta Police Department officers John Freer and Jeffrey Knox arrived at the scene and observed the victim lying face up, evidencing an apparent gunshot wound. (Volume III, T. 124-25, 134-35). There did not appear to be any weapon on the porch. (Volume III, T. 131, 139). An empty shell casing was recovered from the front porch. (Volume III, T. 97, 103). An ambulance transported Mr. Gray from the scene. (Volume III, T. 136). As outlined more fully in the text of this brief, officer Freer arrested the Petitioner at the scene of the offense and the Petitioner's murden weapon was found in the home. (Volume III, T. 101, 126, 135). While transporting the Petitioner to the police station, the Petitioner stated that he had told the victim to leave twice and that he "did not believe what he did was wrong." (Volume III, T. 145).

Cobb County Medical Examiner Wayne Ross performed an autopsy of Willie C. Gray on June 15, 1986. (Volume IV, T. 60, 71). Dr. Ross observed a bullet hole to Mr. Gray's shirt that matched the entry wound to the victim's stomach. (Volume IV, T. 72, 82). Dr. Ross testified at trial that it was a distant gunshot wound. (Volume IV, T. 75, 84). The bullet traveled from the front to the back, from the right to the left, and in a downward direction. (Volume IV, T. 73). The missile went through the fat surrounding the intestines, the descending aorta, the lower part of the spinal column and exited from the back

of the victim. (Volume IV, T. 74). Mr. Gray died as a result of the gunshot wound to the abdomen. (Volume IV, T. 75). There was no indication that any kind of physical contact other than the gunshot wound had occurred. (Volume IV, T. 88).

State Crime Lab firearms examiner Richard Ernest received the Petitioner's Winchester, Model 94, 30-30 lever action rifle, 30-30 cartridge case and 2 live rounds of ammunition. (Volume III, T. 46, 57, 60-61). The rifle was in good mechanical condition and required approximately three pounds of pressure to pull the trigger. (Volume III, T. 67). Mr. Ernest testified at trial that the evidence cartridge case had been fired from the evidence rifle. (Volume III, T. 62).

The Petitioner testified at trial that Mr. Gray came over to the Petitioner's home but that Mr. Gray left when the Petitioner asked that he do so. (Volume IV, T. 105). The Petitioner alleged that Mr. Gray again returned to the Petitioner's home approximately 20-25 minutes later. (Volume IV, T. 105). The Petitioner admitted picking up the rifle and shooting Mr. Gray. (Volume IV, T. 105). The Petitioner also admitted that he did not see Mr. Gray with a weapon but alleged that he feared Mr. Gray would kill him. (Volume IV, T. 105, 106, 109, 112).

The trial jury found the Petitioner guilty of felony murder on January 16, 1987. (Volume V, T. 48). The Petitioner was sentenced to life imprisonment. (Volume V, T. 55).

Further facts will be developed herein as is necessary to more fully explain the Respondent's position.

———o———

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA CORRECTLY HELD THAT THE PETITIONER'S ARREST AND THE SUBSEQUENT DISCOVERY OF THE MURDER WEAPON WERE PROPER.

In his first allegation, the Petitioner alleges that the Supreme Court of Georgia improperly found no Fourth Amendment violation in the instant case in the circumstances surrounding the Petitioner's arrest and the ultimate discovery of the murder weapon in this case. Respondent submits that, contrary to the Petitioner's allegations, the Supreme Court of Georgia properly determined that there was no federal constitutional violation in this case and that this decision provides no basis for the granting of a writ of certiorari.

The specific circumstances surrounding the Petitioner's arrest are as follows. On June 14, 1986, at approximately 5:30 p.m., officer John Freer of the Marietta Police Department received a radio call of a shooting at 261 McIntosh Street in Marietta. (Volume II, T. 159; Volume III, T. 125). On his arrival at that location, officer Freer observed a black male lying face up on the porch of the residence with what appeared to be a gunshot wound to his chest. (Volume II, T. 159). Outside of the residence, there was a crowd of approximately fifty to sixty persons who were yelling and screaming to the officer when he arrived. *Id.* at 159-60.

During the officer's approach to the house, the officer heard at least fifteen different times from persons in

the crowd that the victim had been shot by the Petitioner and that the Petitioner was now in the house. *Id.* at 160. Persons in the crowd also informed the officer that the Petitioner was armed with a shotgun. *Id.* at 161.

Officer Freer approached the house, as his partners circled around the back of the house. *Id.* After ascertaining that there was no weapon lying near the victim, the officer approached the front door of the home. *Id.* Officer Freer heard someone approaching the door and feared that this person was the Petitioner and that the Petitioner would be armed with the shotgun. *Id.* Given this situation in which the officer believed that his life could be in danger, the officer took the initiative in the situation and as the Petitioner started to open the door, the officer pushed the door back himself. *Id.* at 161-62. The officer, having drawn his gun, pointed the weapon at the Petitioner and ordered him to the floor. *Id.* at 162. The officer asked the Petitioner who he was and the Petitioner identified himself as Otis Delay. *Id.* The officer then handcuffed the Petitioner and then placed the Petitioner under arrest. *Id.*

On direct appeal, the Supreme Court of Georgia determined that, while the Petitioner's arrest was warrantless, it was in fact supported by probable cause. *Delay v. State,* 258 Ga. at 230(2a). Basing its decision upon this Court's opinion in *Beck v. Ohio,* 379 U.S. 89, 91 (1964), the Supreme Court of Georgia noted that:

> A 'warrantless arrest' is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officeres and of which they had reasonably trustworthy information were sufficient to warrant a pru-

> dent man in believing that the accused had committed or was committing an offense. (Citations omitted).

Id. This determination by the Supreme Court of Georgia was correct as officer Freer did have reasonably trustworthy information from his own observations at the scene as well as from the persons outside of the home that the Petitioner had in fact shot and killed the victim in this case.

The Petitioner also challenges the discovery of the murder weapon in this case. The weapon had been discovered after the Petitioner had been arrested by officer Freer and the Petitioner had been placed on the floor of the living room of his home. (Volume II, T. 174). At that point in time, along with officer Freer was the officer's partner, Jeff Knox, and Marietta Police Chief, J. A. Whitmire. *Id.* at 8, 162-63, 174. As officer Freer was helping the Petitioner off of the living room floor, detective Dennis Graham of the Marietta Police Department arrived. *Id.* at 8-9, 174. As detective Graham walked into the living room, he generally commented, "Where is the weapon?" *Id.* at 8, 12, 162-63, 172. This question was not directed to anyone in particular and was not intended as a question to the Petitioner. *Id.* at 8, 12, 163. However, it was the Petitioner who responded, "I'll show you where it is." *Id.* at 8, 12-13, 163. The Petitioner then led the police officers to a nearby bedroom, where the rifle in question was laying on top of the bed. *Id.* at 8-9, 163. As detective Graham reached for the rifle, the Petitioner cautioned him that it was loaded and the detective ejected two live shells from the weapon. *Id.* at 9, 13.

On direct appeal, the Supreme Court of Georgia properly determined that in accordance with *Mincey v. Arizona,*

437 U.S. 385, 392-93 (1978), this "warrantless search" of the Petitioner's home was proper based upon the need to protect and preserve life or avoid serious injury under these exigent circumstances. *Delay v. State,* 258 Ga. at 230(b). Additionally, the Supreme Court of Georgia noted that the Petitioner's weapon was in plain view and, "it would have been discovered in the course of even the most cursory search of the house." *Id.* at 231(3a), *citing Nix v. Williams,* 467 U.S. 431, 448 (1984).

As such, given the exigent circumstances of the murder and the fact that the murder weapon was found in plain view at the scene of the crime, the Supreme Court of Georgia properly determined that there was no Fourth Amendment violation presented by the discovery of the rifle.

For all of the above and foregoing reasons, the opinion by the Supreme Court of Georgia presents no basis which would justify the granting of a writ of certiorari to review these allegations by the Petitioner.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE PETITIONER'S STATEMENT WAS ADMISSIBLE AT TRIAL.

In his second and final allegation of the petition, the Petitioner alleges that his rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the admission of his statement at trial.

First of all, Respondent must note that the Petitioner has not previously raised for appellate review and the Supreme Court of Georgia did not address any Sixth Amendment claim in the instant case. Instead, the issue

raised on direct appeal regarding the admissibility of the Petitioner's statement, as noted in the Petitioner's own brief, was stated as follows:

> Statements elicited by police from an arrestee while in custody without benefit of Miranda warnings are in violation of the Fifth Amendment right against self-incrimination, as made applicable to the states through the Fourteenth Amendment. The court therefore erred in denying Appellant's motion to suppress statements obtained from the Appellant while in custody and the "fruits" obtained as a result of these statements; and in denying Appellant's motion for a new trial.

(Petitioner's brief on direct appeal, pp. 7-8). Neither this particular allegation, nor the Petitioner's motion for a new trial, address any Sixth Amendment allegations. Additionally, the Supreme Court of Georgia addressed the admissibility of the Petitioner's statement only in a Fifth Amendment context. *Delay v. State*, 258 Ga. at 230-31 (3a-c). Therefore, to the extent that the Petitioner is attempting to raise a Sixth Amendment claim, this allegation presented for the first time on review to this Court is improperly presented and provides no basis for the granting of a writ of certiorari.

As to the Petitioner's Fifth Amendment claim regarding the admissibility of his statement, the facts at trial demonstrated that the Petitioner had given two statements. The first statement, as outlined above, dealt with Petitioner's statement volunteering the location of the murder weapon. The second statement which is apparently challenged by the Petitioner occurred when the Petitioner was being transported to the Marietta Police Station by

officer David Fann. (Volume II, T. 4-5, 7). The Petitioner asked the police officer, "Why am I being arrested?" *Id.* at 4. The officer explained that he assumed that the Petitioner was being arrested for murder, but it was not up to the officer to decide what charge would be lodged. *Id.* at 4-5. The Petitioner then replied, "I don't think what I did was wrong. I told the guy twice to leave." *Id.* at 5.

On direct appeal the Supreme Court of Georgia determined that the Petitioner's first statement, in relation to the location of the murder weapon, was basically irrelevant as the location of the murder weapon would have been discovered anyway given that the rifle was in plain view and as the first statement was not inculpatory or inconsistent with the Petitioner's defense. *Delay v. State,* 258 Ga. at 231(3a)(b). As to the second statement given by the Petitioner, the Supreme Court of Georgia properly determined that in accordance with *Miranda v. Arizona,* 384 U.S. 436, 444-45 (1966), the Petitioner's statement was not the result of questioning initiated by the police officers, but was instead the Petitioner's response to the police officer's answer to the Petitioner's own question. *Id.* at 231(3c).

Given these factual circumstances, the Supreme Court of Georgia properly determined that there was no violation of the Petitioner's Fifth Amendment rights in the instant case and, therefore, this allegation also presents no basis for the granting of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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